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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Porous Media Corporation

Serial No. 76285935

Carl L. Johnson of Jacobson and Johnson for Porous Media Corporation.

Monique C. Miller, Trademark Examining Attorney, Law Office 108 (David Shallant, Managing Attorney).

Before Hanak, Hairston and Rogers, Administrative Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

Porous Media Corporation (applicant) seeks to register in typed drawing form CHEMFLEX for "general industrial use filter media, namely, air filters for industrial installations." The application was filed on July 2, 2001 with a claimed first use date of June 1, 1992.

Citing Section 2(d) of the Trademark Act, the Examining Attorney refused registration on the basis that applicant's mark, as applied to applicant's goods, is

likely to cause confusion with the mark CHEMI-FLEX previously registered in typed drawing form for "environmental control apparatus, namely, air filtration units for use in clean rooms." Registration No. 2,237,756.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request an oral hearing.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Considering first the marks, we note that marks are compared in terms of visual appearance, pronunciation and connotation, if any. In terms of visual appearance, the marks are extremely similar. Applicant's mark (CHEMFLEX) contains, in the identical order, all but two of the characters found in the cited mark, namely, the letter "I" and the hyphen. Moreover, in terms of pronunciation, the two marks are at a minimum extremely similar. This is

particularly true inasmuch as individuals would not pronounce the hyphen in the cited mark. That is to say, individuals would not pronounce the cited mark as CHEM HYPHEN FLEX. Some individuals could also easily overlook the internal letter "I" in the very middle of the cited mark and thus would pronounce the two marks in the identical manner. It must be remembered that there is no correct pronunciation of a trademark. In re Belgrade Shoe Co., 411 F.2d 1352, 162 USPQ 227 (CCPA 1969). Hence, even if individuals noted the internal letter "I" in the cited mark, many of these same individuals may still pronounce the marks in an identical, or at a minimum, an extremely similar manner. Finally, in terms of connotation, there is no dispute that both marks bring to mind the words "chemical" and "flexible." Thus, the two marks have the same connotation.

In its 16 page brief, applicant never even discussed the issue of the similarity or dissimilarity of the marks. Because the marks are extremely similar in terms of visual appearance; are extremely similar (and for some people identical) in terms of pronunciation; and are identical in terms of connotation, we find that overall the marks are extremely similar if not nearly identical. Thus, the first Dupont "factor weighs heavily against applicant" because

applicant's mark is extremely similar if not nearly identical to the cited mark. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Turning to a consideration of applicant's goods and registrant's goods, we note that because the marks are extremely similar if not nearly identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." In re Shell Oil Co., 922 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). However, in this case we find that applicant's goods and registrant's goods are clearly related. Both applicant's goods and registrant's goods filter air. Moreover, as applicant points out at page 13 of its brief, applicant's air filters and registrant's air filtration units are both purchased by the same users, namely, industrial buyers as opposed to "laymen."

Given the fact that applicant's mark is extremely similar to if not nearly identical to the registered mark and the additional fact that both marks are used on goods which are clearly related, we find that the contemporaneous use of both marks would result in a likelihood of confusion. Accordingly, we affirm the refusal to register.

In arguing that confusion is not likely, applicant sets forth three basic arguments. First, as just noted, applicant states that the purchasers of both its goods and registrant's goods are industrial buyers who, unlike laymen, are "careful [and] sophisticated" in their purchases. (Applicant's brief page 13). We do not dispute the fact that industrial buyers are more careful and are more sophisticated in making purchases than are laymen. However, such purchaser sophistication is of very minimal value in avoiding a likelihood of confusion when the marks are so extremely similar to the point of being nearly identical, as is the case here. Obviously, even the most sophisticated purchasers in the world could not distinguish applicant's mark from registrant's mark if they were identical. While the marks in question here are not absolutely identical, they are so extremely similar to the point of being nearly identical such that purchaser sophistication would simply not prevent a likelihood of confusion.

Second, at pages 9 through 11 of its brief, applicant argues that because there have been no instances of actual confusion involving its mark and the registered mark that therefore there is no likelihood of confusion. There are a number of fatal flaws with applicant's argument. First,

there is nothing in the record from registrant indicating that it has not experienced confusion involving its mark and applicant's mark. Second, applicant has made of record no evidence whatsoever reflecting the extent to which it has used its mark. For example, applicant has not even indicated the number of air filters it has sold bearing its mark CHEMFLEX. For all this Board knows, applicant's sales of its CHEMFLEX air filters could be so minimal that there has been no meaningful opportunity for actual confusion to even occur. Likewise, this Board has no knowledge as to the extent to which registrant has used its mark CHEMI-FLEX. Registrant's use of its mark could also be so minimal such that there has been no meaningful opportunity for confusion to occur. Finally, there is nothing in the record to reflect where applicant sells its air filters and where registrant sells its air filtration units. Even assuming purely for the sake of argument that applicant's and registrant's sales were more than just minimal, applicant's sales and registrant's sales could occur in geographic areas that are quite removed from one another such that there is simply no realistic possibility for actual confusion to occur.

Finally, at pages 8 and 9 of its brief applicant argues that because it purportedly used its mark CHEMFLEX

before registrant used its mark CHEMI-FLEX that therefore "applicant has superior rights to the use of the mark CHEMFLEX." Suffice it to say, that in an ex parte proceeding such as this, applicant may not attack the validity of the cited registration. This rule specifically precludes an argument by applicant that it used its mark prior to the time that the cited mark was used. In re Calgon Corp., 435 F.2d 596, 168 USPQ 278 (CCPA 1971).

Accordingly, even assuming purely for the sake of argument that applicant did indeed continuously use its mark from a point in time predating the first use of the cited mark, this is legally irrelevant in an ex parte proceeding.

Decision: The refusal to register is affirmed.